

FILED BY CLERK

MAR 10 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

SHAWN R.,)	2 CA-JV 2009-0112
)	DEPARTMENT A
Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
JOHN M.; CATHY M.; and)	Appellate Procedure
SHAWN R., JR.,)	
)	
Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. S-188152

Honorable Karen S. Adam, Judge Pro Tempore

AFFIRMED

Nuccio & Shirly, P.C.
By Salvatore Nuccio

Tucson
Attorneys for Appellant

Scott E. Myers

Tucson
Attorney for Appellees John M. and Cathy M.

E S P I N O S A, Presiding Judge.

¶1 Appellant Shawn R. appeals from the juvenile court's October 23, 2009 order terminating his parental rights to his son, Shawn R., Jr., on the ground of

abandonment, *see* A.R.S. § 8-533(B)(1), as alleged in a petition filed by John M. and Cathy M., the boy's maternal grandparents. On appeal, Shawn argues the court's determination that he had abandoned his son was erroneous. Although he does not specifically challenge any of the factual findings underlying the court's order, Shawn appears to argue those findings were insufficient to support the ground alleged. In particular, he maintains the evidence established he had just cause for failing to maintain a normal parental relationship with Shawn, Jr., because Cathy and John had "play[ed] an active role in preventing [him]" from doing so. We affirm.

¶2 On appeal, we view the evidence in the light most favorable to sustaining the juvenile court's ruling, *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 20, 995 P.2d 682, 686 (2000), and we accept the court's findings of fact as long as substantial evidence supports them, *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 4, 210 P.3d 1263, 1264 (App. 2009). As well-summarized in the juvenile court's order, the evidence at the contested termination hearing supported the following findings. Shawn had never been married to his son's mother, Amanda M., who gave birth to Shawn, Jr. in 1998. The couple lived in the state of New York, for a time residing with Amanda's parents, Cathy and John. Later, Cathy and John rented an apartment for the couple and loaned them automobiles to use. In January 2001, after Amanda and Shawn had separated, a New York court awarded physical custody of Shawn, Jr. to Amanda and granted Shawn visitation privileges one evening each week and on alternate weekends. Amanda and Shawn, Jr. returned to live in her parents' home.

¶3 Between 1998 and 2004, Cathy obtained several orders of protection to prevent Shawn from harassing her, John, or Amanda. She testified Shawn had physically assaulted her in 1998 and had since damaged vehicles belonging to her and John by kicking the exterior, breaking windshields, and cutting upholstery. Cathy also stated Shawn had telephoned her incessantly after he and Amanda had separated, sometimes calling her more than seventy-five times in a week. At the termination hearing, Cathy agreed Shawn, Jr. had been identified as a protected party on at least one of the orders of protection she had obtained. But Shawn, Jr. was not named as a protected party on the orders of protection issued after Shawn had been granted visitation in 2001. Indeed, the permanent orders of protection that were issued in 2001 and 2003 specified their prohibitions were “subject to” the family court’s order providing Shawn with visitation privileges.

¶4 Despite the express preservation of his visitation rights, Shawn saw his son only about ten times between 2000 and 2004. Although Shawn had filed a motion in New York’s family court in 2002 to modify or enforce his visitation rights, he apparently withdrew his request at a hearing on the motion. Between the withdrawal of his motion and service of the petition to terminate his parental rights in 2008, Shawn never sought any further assistance from the court to enforce the visitation order.

¶5 Shawn last saw Shawn, Jr. in the spring of 2004, and he had not seen him for a year before that visit. In June 2004, Amanda married and moved to a military base sixty or seventy miles away, and Cathy provided Shawn with Amanda’s contact

information. Later that year, Amanda reportedly drove Shawn, Jr. to the town where her parents lived for a scheduled visitation with Shawn, but he did not appear. According to the social study report prepared for the juvenile court, “There is no history of Shawn . . . contributing child support or making any contributions to his son’s care since at least 2004, and most likely long before [then].”

¶6 In August 2004, Amanda’s parents moved to Arizona. Amanda and Shawn, Jr. followed in August 2005 and moved in with Cathy and John in July 2007. Shawn contacted Cathy once or twice each year from August 2004 through September 2008. On those occasions, Cathy did not tell him Amanda and Shawn, Jr. were in Arizona.

¶7 Amanda died in an automobile accident in June 2008; in September, Cathy and John filed a petition to terminate Shawn’s parental rights on the ground of abandonment, pursuant to § 8-533(B)(1), so that they could adopt Shawn, Jr. John testified that Shawn had provided no financial support for Shawn, Jr. between October 2008, when Shawn was served with the termination petition and learned his son was living with John and Cathy, and the termination hearing in August 2009. In its order terminating Shawn’s parental rights, the juvenile court found the allegations of abandonment had been proven and that termination was in Shawn, Jr.’s best interests.

¶8 On appeal, Shawn argues he did not abandon his son, but had been unable to maintain a normal parental relationship with him because of the maternal grandparents’ interference. According to Shawn, Cathy and John “inhibited [his]

parental contact” by obtaining orders of protection when they lived in New York and by failing to tell him Shawn, Jr. and Amanda had been living in Arizona since 2005.

¶9 We will affirm a juvenile court’s order terminating parental rights “‘unless we must say as a matter of law that no one could reasonably find the evidence [supporting statutory grounds for termination] to be clear and convincing.’” *Denise R.*, 221 Ariz. 92, ¶ 10, 210 P.3d at 1266, *quoting Murillo v. Hernandez*, 79 Ariz. 1, 9, 281 P.2d 786, 791 (1955) (alteration in *Denise R.*). We conclude substantial evidence supported the court’s ruling here.

¶10 “Abandonment” for purposes of § 8-533(B)(1) is defined in A.R.S. § 8-531(1) as follows:

“Abandonment” means the failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. Abandonment includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment.

Further, “abandonment is measured not by a parent’s subjective intent, but by the parent’s conduct: [§ 8-531(1)] asks whether a parent has provided reasonable support, maintained regular contact, made more than minimal efforts to support and communicate with the child, and maintained a normal parental relationship.” *Michael J.*, 196 Ariz. 246, ¶ 18, 995 P.2d at 685-86.

¶11 Shawn may not have known where Amanda and Shawn, Jr. were living after they moved to Arizona in 2005. But, apart from his infrequent calls to Amanda’s

parents, he did not make any significant effort to find out where Shawn, Jr. was or to support his child. And we agree with Cathy and John that the court reasonably could have found Shawn's abandonment of his son was complete before Amanda and Shawn, Jr. ever left New York. Shawn was responsible for the protective orders due to his improper actions, and so was also responsible for any difficulties in arranging visitation those orders may have caused. But the orders of protection were subject to his visitation rights and did not prevent him from visiting his son. Moreover, based on the motion he filed and then withdrew in 2002, Shawn clearly knew he could seek enforcement of the New York court's parenting order if Amanda, Cathy, or John had been interfering with his visitation rights, but he failed to pursue such relief. Yet, during 2003 and 2004, when Shawn knew where to find his son, he visited Shawn, Jr. as infrequently as once a year and provided little, if any, financial support.

¶12 Ample evidence thus supported the juvenile court's finding that Shawn had failed to make "more than minimal efforts" to support, communicate with, or parent Shawn, Jr. *Michael J.*, 196 Ariz. 246, ¶ 18, 995 P.2d at 685-86. Accordingly, we affirm the court's termination order.

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge